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Supreme Court, U.S.
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No. 10-916

IN THE SUPREME COURT OF THE UNITED STATES

JOHN HENRY RYSKAMP,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition for Writ of Certiorari
Before Judgment
To the Ninth Circuit Court of Appeals

SUPPLEMENTAL BRIEF

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Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Has the United States (through HAMP, the Collection Financial Standards and other policies and actions) raised the level of scrutiny for transportation—with maintenance, housing, income and employment as indicia—above minimum scrutiny?

2. Has the United States (through these same policies and actions) raised the level of scrutiny for maintenance—with housing, transportation, income and employment as indicia—above minimum scrutiny?

3. Considering that this Court has said, *in District of Columbia v. Heller*, that the levels of scrutiny are merely "prohibitions on irrational laws," has declined to rule on the *Heller* facts based on the scrutiny regime, and has declined to assign a level of scrutiny to the *Heller* facts, which actions have led to contradictory holdings in the lower courts, has this Court in *Heller* and *McDonald v. Chicago* overruled the scrutiny regime and promulgated the doctrine that the Constitution only maintains important facts, among which is transportation?

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Ransom v. FIA Card Services, No. 09-907,
Slip Opinion, 2011 1 et seq.

United States v. Carolene Products,
304 U.S. 144 (1938) 2 et seq.

West Coast Hotel v. Parrish,
300 U.S. 379 (1937) 2 et seq.

West Virginia v. Barnette,
319 U.S. 624 (1943) 1 et seq.

INTERNAL REVENUE SERVICE RULINGS

Revenue Ruling 2009-19 1 et seq.

OTHER GOVERNMENT DOCUMENTS

Collection Financial Standards, http: //www .irs.gov / individuals/ article/ 0,,id=96543,00. html (March 1, 2010) 1 et seq.

I. *RANSOM* DID NOT RESOLVE THE ISSUES RAISED IN THE PETITION FOR A WRIT OF CERTIORARI.

In my Petition, I noted that, as in my case pending before the Ninth Circuit, the level of scrutiny for transportation and the minimization of the risk of loss of transportation—or the scope of transportation—was at issue in *Ransom v. FIA Card Services* (No. 09-907, Slip Opinion, 2011). I noted, on the basis of oral argument, that the Court was in danger of promulgating a holding which continued to lodge deference and discretion in the political system with respect to transportation. At the same time, *Heller/McDonald* had made it abundantly clear that the scrutiny regime had been overruled. In addition, HAMP in conjunction with Revenue Ruling 2009-19, United States ownership interests in, and servicing agreements with, financial institutions, and the Collection Financial Standards, had together made it explicit that transportation is an important fact not part of the political system. Thus, an anomalous holding was in view unless the issue of the Constitutional regime was addressed.

In the event the Constitutional regime was not addressed and we have an anomalous *Ransom* holding. In the *Ransom* holding, new doctrines of "essential" and "affordable" are promulgated, evidently after applying the *Barnette* test to the facts. The full range of Collection Financial

Standards facts—including but by no means limited to—transportation are now subject to these two new doctrines. This suggests that there is no deference to, or discretion in, the political system with respect to these facts. And yet *Heller/McDonald* doctrines are not addressed, and according to those cases their doctrines must be addressed if *Barnette* "important" facts are found. Also, even though "important" facts are found in *Ransom*, *West Coast Hotel/Carolene Products* scrutiny regime language is used. Anomalous indeed.

Pursuant to Rule 15.8, I file this Supplemental Brief to call the Court's attention to the newly decided case. *Ransom* does not indicate the Constitutional regime under which it is decided, the *West Coast Hotel/Carolene Products* regime or the *Heller/McDonald* regime. *Ransom* leaves unresolved the level of scrutiny of the *Ransom* facts, and the minimization of the risk of loss of them—if the Constitutional regime is still the *West Coast Hotel/Carolene Products* regime—or the "scope" of the facts, if the Constitutional regime is the *Heller/McDonald* regime.

The Court's *Ransom* opinion does not give guidance to the lower courts—including the Ninth Circuit, where *Ryskamp v. Commissioner* is pending—on these issues, because it is anomalous—self-confessedly so. The state of the law after *Ransom* still does not resolve the

dispositive question: what is the Constitution with respect to "essential items" and "affordability"? *Ransom* merely puts another label on *Barnette* "important" facts in order to avoid dealing with the issue of the Constitution with respect to those facts. Thus, the Court should grant the petition for a writ of certiorari to deal with the issue of the Constitutional regime. My case remains in the same posture as before *Ransom* was decided.

II. THE *RANSOM* HOLDING IS UNRESPONSIVE EITHER TO *THE WEST COAST HOTEL/CAROLENE PRODUCTS* SCRUTINY REGIME OR TO THE *HELLER/MCDONALD* MAINTENANCE REGIME.

The *Ransom* falls between two stools, although, since the Court is apparently applying two mutually contradictory Constitutional regimes, that is no surprise. The Court justifies the "oddity" of its holding by claiming that that "is the inevitable result of a standardized formula like the means test, even more under *Ransom*'s reading than under ours. Such formulas are by their nature over- and under-inclusive. In eliminating the pre-BAPCPA case-by-case adjudication of above-median income debtors' expenses, on the ground that it leant itself to abuse, Congress chose to tolerate the occasional peculiarity that a brighter-line test produces. And Ransom's

alternative reading of the statute would spawn its own anomalies...." Slip Opinion at 16.

The very terms in which the Court couches this justification—"standardized formula," "over- and under-inclusive," and "brighter-line test"—are unconstitutional vagueness because they contradict the Court's own statement that the same facts are "essential," and in conjunction with HAMP and Revenue Ruling 2009-19 and with United States ownership interests in financial institutions and servicing agreements with financial institutions. Also, the Court's terms are not the "scope" inquiry mandated by *Heller/McDonald*. What is the Constitutional regime?

Specifically, the Court leaves unresolved the Collection Financial Standards in conjunction with United States ownership interest in, and servicing agreements with financial institutions and HAMP in conjunction with Revenue Ruling 2009-19. *Ransom* holds that the facts of the Collection Financial Standards are "essential items." Slip Opinion at 8, 17. The doctrine of affordability of "essential items" is the same one—and includes the same facts—as that of the HAMP limitation of 31% ratio of gross income to mortgage payment (which includes principal, interest, taxes, insurance—including homeowners insurance and hazard and flood insurance—and homeowners association and condominium fees). That doctrine is the minimization of the risk of loss of what the Court

deems "essential" facts. The *Ransom* Court says: "Rather than effecting any broad federal policy as to saving or borrowing, the deductions serve merely to ensure that debtors in bankruptcy can afford essential items." Slip Opinion at 17. This is question begging, even if we consider only *Ransom* in the light of HAMP and Revenue Ruling 2009-19 and United States ownership interests in and servicing agreements with financial institutions. It is entirely unresponsive to the "scope" factual inquiry mandated in *Heller/McDonald*. What is the "federal policy," that is, what is the Constitutional regime? This question is just as unavoidable, and as unanswered, now as when *Ransom* was pending. Even *Ransom* cannot be resolved without answering it, and the Court says as much.

Note that the Court's doctrine of "essential" and "affordability" are the Court engaging in its own *Barnette* inquiry into the facts. The Court ITSELF has determined that the facts listed above, are important facts—thus, they are removed from the political process, but "without benefit of clergy," as it were. That is, it has violated the *Heller* rule regarding both the political system and judges: "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." That is, the Court has promulgated "essential" and "affordability" doctrines without

telling us the Constitutional regime. *Ransom* is the Court saying that we must not, and "the Judicial Department" need not, "look into" the Constitution. But that *violates Marbury v. Madison*, 5 U.S. (1 Cranch) at 137, 176, 177, 179.

The *Ransom* holding is neither the minimization of the risk of loss of those facts, nor the level of scrutiny for those facts above minimum scrutiny, nor the "scope" of those facts.

These "essential facts" and "affordability" doctrines alone are new in the Court's jurisprudence. What does "essential" and "affordable" mean according to the Constitution? Thus are new doctrines, new reasons for granting the petition.

III. THE COURT SHOULD GRANT THE PETITION TO PROVIDE GUIDANCE TO THE LOWER COURTS WITH RESPECT TO THE *WEST COAST HOTEL/CAROLENE PRODUCTS* SCRUTINY REGIME.

a. Minimization of the risk of loss. Under the *Ransom* holding, in particular with respect to "essential" and "affordability," in conjunction with HAMP and Revenue Ruling 2009-19 and United States ownership interests in, and servicing agreements with, financial institutions, the Court should grant the petition. It should direct the Tax Court to determine the minimization

of the risk of loss (the "affordability") of the facts the Court deemed "essential" per the Collection Financial Standards and the HAMP affordability measures, including housing and utilities; mortgage or rent, property taxes; interest; insurance; education; maintenance; repairs; gas; electric; water; heating oil; garbage collection; telephone and cell phone services; food, housekeeping supplies; apparel and services; personal care products and services, and miscellaneous; health care.

b. The level of scrutiny. Under the same holding, in particular with respect to "essential" and "affordability," in conjunction with HAMP and Revenue Ruling 2009-19 and United States ownership interests in, and servicing agreements with, financial institutions, the Court should grant the petition. It should direct the Tax Court to state the level of scrutiny for the facts the Court deemed "essential" per the Collection Financial Standards and the HAMP affordability measures, including housing and utilities; mortgage or rent, property taxes; interest; insurance; education; maintenance; repairs; gas; electric; water; heating oil; garbage collection; telephone and cell phone services; food, housekeeping supplies; apparel and services; personal care products and services, and miscellaneous; health care.

IV. THE COURT SHOULD GRANT THE PETITION TO PROVIDE GUIDANCE TO THE LOWER COURTS WITH RESPECT TO THE *HELLER/MCDONALD* MAINTENANCE REGIME.

a. Essential. Under the *Ransom* holding, in particular with respect to "essential" and "affordability," in conjunction with HAMP and Revenue Ruling 2009-19 and United States ownership interests in, and servicing agreements with, financial institutions, the Court should grant the petition. It should direct the Tax Court to determine the scope of the facts the Court deemed "essential" per the Collection Financial Standards and the HAMP affordability measures, including housing and utilities; mortgage or rent, property taxes; interest; insurance; education; maintenance; repairs; gas; electric; water; heating oil; garbage collection; telephone and cell phone services; food, housekeeping supplies; apparel and services; personal care products and services, and miscellaneous; health care.

b. Affordable. Under the *Ransom* holding, in particular with respect to "essential" and "affordability," in conjunction with HAMP and Revenue Ruling 2009-19 and United States ownership interests in, and servicing agreements with, financial institutions, the Court should grant the petition. It should direct the Tax Court to determine the minimization of the risk of loss (the

"affordability") of the facts the Court deemed "essential" per the Collection Financial Standards and the HAMP affordability measures, including housing and utilities; mortgage or rent, property taxes; interest; insurance; education; maintenance; repairs; gas; electric; water; heating oil; garbage collection; telephone and cell phone services; food, housekeeping supplies; apparel and services; personal care products and services, and miscellaneous; health care.

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